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No. 99-1483

IN THE
Supreme Court of the United States

PACIFIC MARITIME ASSOCIATION,

Petitioner,

v.

THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 68, an unincorporated association,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

A. THIS COURT HAS EXPRESSLY LEFT UNDECIDED WHETHER A NON-NLRA UNION CAN BE SUBJECT TO LIABILITY UNDER SECTION 303 OF THE LMRA 2

B. THE SECOND CIRCUIT HAS NOT ABROGATED *MARRIOTT* 3

CONCLUSION 4

TABLE OF AUTHORITIES

Page(s)

CASES

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) ..... *passim*

Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429 (1987) ..... *passim*

International Brotherhood of Electrical Workers v. NLRB, 350 F.2d 791 (D.C. Cir. 1965) 3

Long Island Railroad Co. v. International Ass'n of Machinists, 874 F.2d 901 (2d Cir. 1989) 1, 4

Marriott In-Flite Services v. Local 504, Air Transport Division, Transport Workers, 557 F.2d 295 (2d Cir. 1977) ..... *passim*

STATUTES

Labor Management Relations Act ..... *passim*

National Labor Relations Act ..... *passim*

Railway Labor Act ..... *passim*

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In its petition for a writ of certiorari, Pacific Maritime Association ("PMA") demonstrated that the holding of the United States Court of Appeals for the Ninth Circuit in this matter – that public sector unions may not be held liable for secondary boycott activity under Section 303 of the Labor Management Relations Act (the "LMRA") – conflicts directly with the holding of the United States Court of Appeals for the Second Circuit in *Marriott In-Flite Services v. Local 504, Air Transport Division, Transport Workers*, 557 F.2d 295 (2d Cir. 1977). Indeed, the Ninth Circuit itself expressly "recognize[d] [that] the Second Circuit reached a different conclusion" in *Marriott*.

Respondent presents two arguments in opposition. *First*, respondent asserts that the decisions of this Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), and *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987), conclusively establish that public sector unions cannot be subject to Section 303. *See* Opp. 2-6.

Second, respondent argues that notwithstanding the Ninth Circuit's recognition that it was creating a divergence in the federal appellate case law, there is in fact no difference in the law of the Second and Ninth Circuits. Specifically, respondent argues that the Second Circuit abandoned the rule of *Marriott* in *Long Island Railroad Co. v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989). *See* Opp. 7.

Neither of respondent's contentions has merit, and PMA respectfully submits that this Court should grant the writ of certiorari in order to resolve the split in the Circuits regarding this important issue of federal labor law.

A. This Court Has Expressly Left Undecided Whether A Non-NLRA Union Can Be Subject To Liability Under Section 303 Of The LMRA

Respondent asserts that this Court's decisions in *Jacksonville Terminal* and *Burlington Northern* resolve the question presented in the petition for certiorari: whether a public sector union is liable under Section 303 of the LMRA for secondary boycott activities that inflict substantial economic damage upon a neutral employer. In those cases, this Court held that neither the state courts nor the federal courts may enjoin secondary activity by unions subject to the Railway Labor Act (the "RLA") directed against employers subject to the RLA. *See Jacksonville Terminal*, 394 U.S. at 380-81 (state courts); *Burlington Northern*, 481 U.S. at 450-53 (federal courts). The critical fact common to both cases is that all parties to the disputes were subject to the RLA, which has extensive provisions for resolving conflicts between unions and employers.

The reasoning of those cases is inapplicable, however, when one or more parties to a labor dispute is subject to the National Labor Relations Act (the "NLRA"). In *Jacksonville Terminal*, this Court carefully avoided expressing an opinion as to the legality of secondary boycotting in such disputes:

> Whatever might be said where railway organizations act as agents for, or as joint venturers

> with, unions subject to the NLRA; or where railway unions are engaged in a dispute on behalf of their nonrail employees; or where a rail carrier seeks a remedy against the conduct of nonrail employees, none of these is this case. *This is a railway dispute, pure and simple.*

394 U.S. at 377 (citations omitted; emphasis added). Indeed, this Court expressly stated that "[o]ur holding is, of course, limited to disputes subject to the Railway Labor Act." *Id.* at 393 n.25. The opinion cited *International Brotherhood of Electrical Workers v. NLRB*, 350 F.2d 791 (D.C. Cir. 1965), a case holding unions that were subject to the RLA liable under Section 303 of the LMRA for secondary boycott activity when acting in concert with NLRA unions. *See* 350 F.2d at 792.

Thus, after *Jacksonville Terminal*, the rule is that secondary boycotting is not unlawful in the context of a dispute solely between RLA unions and employers. *Burlington Northern* was also a "railway dispute, pure and simple," and did not address the categories of disputes involving non-RLA entities expressly distinguished in *Jacksonville Terminal*. It is therefore an open question whether a non-NLRA union such as respondent may lawfully engage in secondary boycotting in concert with unions subject to the NLRA and against an employer subject to the NLRA.

Indeed, respondent engaged in the secondary boycott activity in issue along with two unions, Local 13 and Local 63 of the International Longshore and Warehouse Union, that are subject to the NLRA. *See* Pet. App. 2a-3a. This case therefore falls squarely within the category of disputes this Court expressly chose not to express an opinion on in *Jacksonville Terminal*, 394 U.S. at 377.

B. The Second Circuit Has Not Abrogated *Marriott*

Respondent states that the Second Circuit has "repudiated the main premise of *Marriott In-Flite Services* and by doing so has left that decision without present force or effect." Opp. 7. Respondent bases that assertion on a single quote

plucked from *Long Island Railroad Co. v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989). According to respondent, "the Second Circuit has corrected itself by recognizing 'that secondary picketing [by RLA unions] is allowed by *Burlington Northern*.'" Opp. 7 (quoting *Long Island Railroad Co.*, 874 F.2d at 910).

But all parties to the dispute in *Long Island Railroad Co.*, as in *Jacksonville Terminal* and *Burlington Northern*, were subject to the RLA: once again, "a railway dispute, pure and simple." At issue in *Long Island Railroad Co.* was whether the court could enjoin a sympathy strike by unions subject to the RLA that had not first exhausted the RLA dispute resolution procedures. *Long Island Railroad Co.* neither mentions *Marriott* nor purports to decide questions relating to the applicability of Section 303 of the LMRA to conflicts involving both NLRA and non-NLRA entities.

Marriott remains the rule in the Second Circuit with respect to secondary boycott activity by non-NLRA unions against NLRA employers. Thus, the law of the Second and Ninth Circuits is in conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

May 17, 2000

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